Ogihara America Corporation *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO and Leo Andre Ahern. Cases 7–CA–47942 and 7–CA–48024

May 30, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND KIRSANOW

On November 3, 2005, Administrative Law Judge Michael A. Rosas issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and Charging Party Leo Andre Ahern filed answering briefs, and the Respondent filed a reply brief. The General Counsel also filed cross-exceptions and a supporting brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(1), (3), and (4) of the Act by discharging Charging Party Ahern. The judge further found that the Respondent violated Section 8(a)(1) by interrogating Ahern and employee Bruce Pierson, and by threatening employees that additional money damages would be sought against Ahern if the Union had any involvement in his concerted activity. We find, contrary to the judge, that the Respondent did not violate the Act by discharging Ahern or by interrogating Ahern or Pierson. We agree with the judge, however, that the threat to employees violated Section 8(a)(1). Our reasons for so finding are set forth below.

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Facts

This case involves allegedly unlawful conduct after a January 9, 2004[3] election, which the Union lost. The allegations stem from the conduct of Ahern, a press maintenance technician on the second shift.

Ahern had taken part in the organizing campaign by attending campaign meetings before the election, wearing and displaying union insignia, discussing the Union while at work, distributing authorization cards and union literature, serving as an observer during the election, and participating in the election vote count. Ahern was also one of several employees who testified on behalf of the Union at a May 25, 2004 hearing before Administrative Law Judge George Carson II concerning objections to the election and alleged unfair labor practices.[4] Ahern also engaged in concerted activity in March 2004 when he and other employees protested the termination of another press maintenance technician, Michael Daniels.

Later, Ahern began focusing on the conduct of Supervisor David Gaffka, the third-shift press maintenance facilitator. Between May 25 and July 12, Ahern and two other second-shift press maintenance technicians, Thomas Griswold and Christopher Simmons, often discussed Gaffka. The three employees were concerned that Gaffka was complaining to supervisors in other departments about the substandard work of employees when the three believed that there were problems with the quality of Gaffka's own work. When Simmons saw Gaffka allegedly treat another employee in the tool room badly and then write him up for shoddy workmanship, the three employees decided to try to get Gaffka demoted.

They decided to write an anonymous letter to the Respondent's president, Tokio Ogihara, which Ahern agreed to draft. Simmons and Griswold suggested some changes, which Ahern incorporated into the final draft. Simmons also supplied photographs purportedly depicting Gaffka's work to include with the letter. The June 2 letter stated:

> We are writing to you as a group of associates both concerned, and disturbed by the conduct and behavior of one of your Press Maintenance Facilitators—Dave Gaffka. On several occasions Dave has approached Troy Burley and other managers making accusations of alleged mistakes made by their associates in their work. Dave was threatening that he

[3] All dates are in 2004, unless otherwise indicated.

[4] On November 30, 2004, the Board affirmed Judge Carson's July 12, 2004 decision finding that the Respondent violated Sec. 8(a)(3) and (1) by issuing an employee a written warning for distributing union literature in a nonworking area on nonworking time, and that the election should be set aside based on that violation. *Ogihara America Corp*., 343 NLRB No. 91 (2004).

would have people written up. Dave has been mistaken in many of these accusations—even accusing people of things that happened on days they were not even at work. This shows no regard for core values.

We feel that Dave lacks the proffesionalism [sic], technical skills, and the people skills necessary to be a facilitator at OAC. As a facilitator he is a representative of OAC and creates a bad image of this company. In this time of corporate cost cutting, we respectfully request that you personally investigate Dave's usefulness and impact to OAC. Turning this matter over to your management team will not solve the problem, as some of your managers promote this behavior. It is your choice to act on this matter or not to, however many associates would welcome the thought of you taking a more active part in managing the managers at OAC. If you choose not to respond please keep this confidential.

Enclosed are photos of Dave's own poor workmanship.

Thank You for your attention to this problem.

Ahern, Griswold, and Simmons enclosed 11 photographs depicting areas, equipment, or machinery where Gaffka worked during 2000 to 2004 that they believed required corrective action. The photographs contained captions pointing out what the employees believed were the problems with Gaffka's work.

Ahern, Simmons, and Griswold decided to send the letter and photographs (the package) to Ogihara anonymously because they were concerned about reprisal if they signed their names. On June 9, Ahern went to the Federal Express (FedEx) service desk at a Kinko's in Novi, Michigan, to mail the package. A Kinko's employee told Ahern that he had to complete the sender and return address information on the FedEx label. Due to the anonymous nature of the package and Ahern's belief that the Respondent would be hostile to him because of his union activity, Ahern decided against using his own name and address. Ahern instead used the name of another press maintenance technician, Bruce Pierson, on the return address label. Ahern knew that Pierson, a first-shift employee, opposed union affiliation, and Ahern believed that listing Pierson's name on the return address would be more likely to evoke a response from Ogihara concerning the employees' complaints. Ahern did not use Pierson's address as the return address. Instead, he looked in the telephone book for the address of the county courthouse and wrote that address and a fictitious telephone number on the label.

President Ogihara received the package on June 10. At his direction, Production Manager Michael Zimmerman instructed Human Resources Executive Manager Patrick Casady to investigate the letter's allegations. Casady, in turn, directed Executive Manager John Ruhman to investigate the allegations.

Casady also met with Pierson on June 11. Casady showed Pierson the letter and photographs and asked if he had seen them before. Pierson denied sending them, and Casady asked if Pierson knew who had sent them. Casady told Pierson that they were trying to figure out who might have sent the package. Casady asked Pierson whether he might have enemies who could have sent the package in his name, but Pierson maintained that he did not know.

About June 21, Casady went to Kinko's and spoke with Lee Flamard, the assistant store manager, in an effort to find out who sent the package. Flamard told Casady that Kinko's had a videotape for the day the package was sent, but that he could not release it without a subpoena. Casady later met with Gaffka to elicit his participation in a lawsuit against the person who sent the package. Casady showed Gaffka the envelope, letter, and photographs, and Gaffka told Casady that "a lot of these were not correct." Casady replied that the Respondent was "doing an investigation into the whole package."

Gaffka and Pierson agreed to be named plaintiffs in a legal action and, on June 28, the Respondent arranged for its counsel in this proceeding to commence a lawsuit in Livingston County Circuit Court on behalf of Gaffka and Pierson. The lawsuit charged "John Doe" defendants with defamation and tortuous interference with employment when they sent the package to the Respondent, and in connection with that action the Respondent requested issuance of a subpoena to Kinko's for the production of the videotape.

The Respondent obtained a subpoena from the circuit court and, on August 2, Kinko's permitted Casady to view the surveillance videotape for June 9. The tape showed that Ahern had sent the package. Casady returned to the facility and met with Zimmerman and Ruhman. Subsequently, Casady decided to discharge Ahern based on Ahern's false designation of Pierson as the sender of the package and the false allegations against Gaffka.

On August 3, Casady instructed a supervisor to bring Ahern to his office. When Ahern arrived, Casady showed him the package and asked him if he knew anything about it. Ahern denied any knowledge of the package and remained silent when Casady reviewed its contents. Ahern did not respond when Casady told him that he had been seen on the Kinko's surveillance videotape. Casady then told Ahern that his deceptive acts warranted

termination under the Respondent's rules of conduct 19, 21, and 31.[5]

On August 4, Casady sent a letter to Ahern confirming his termination, and he appended a completed "rules of conduct violation form," which stated:

> On 8/3/04 it was discovered that Andy sent a package from Kinko's of Novi to Mr. Ogihara. The return address indicated Bruce Pierson, Andy said Bruce had nothing to do with it. The package contained a letter and pictures (letter is attached).

The form listed the violated rules as 19, 21, and 31, and the rule 31 violation was noted to be the "most severe."

About 2 weeks after Ahern's discharge, Casady met with Simmons, Griswold, and other press maintenance shift employees after the initial and amended charges in this proceeding had been posted next to the employee timeclock. Casady told the employees that he had heard rumors about the circumstances leading to Ahern's discharge and he wanted to clarify the facts. He explained that the discharge was related to Ahern's transmission of the package and that unnamed parties had responded by filing a lawsuit for $25,000 in damages. Casady also stated that the unnamed plaintiffs "may go in [the] direction" of suing for $25 million if the Union was determined to be involved.

Analysis

A. The 8(a)(1) Discharge Allegation

The judge found that the Respondent discharged Ahern on August 3 in violation of Section 8(a)(1) of the Act, concluding that Ahern was discharged for engaging in protected concerted activity. We disagree. Assuming arguendo that Ahern's complaints about Gaffka—as assembled in the package sent to Ogihara—were protected, we find that Ahern lost the protection of the Act by deliberately falsifying the name of the sender of the package. Because Ahern was discharged for the unprotected falsification of Pierson's name on the package, we find that Ahern's discharge did not violate Section 8(a)(1).

In finding that Ahern did not lose the protection of the Act by using Pierson's name on the package, the judge found that such conduct, "although less than virtuous and obviously aggravating to Pierson," was not so egregious as to remove it from the protection of Section 7. The judge noted that the Board permits employees significant leeway to make false statements while engaging in protected activity absent a showing of "deliberate falsity or maliciousness." The judge found that Ahern did not have a personal motive in using Pierson's name,[6] and that Ahern was legitimately concerned about reprisals and the likelihood that Ogihara would not respond effectively if he knew that Ahern had sent the package. The judge found that using Pierson's name had the effect of keeping the letter anonymous. The judge therefore concluded that under the circumstances, Ahern's false information on the return address label was not so "opprobrious, profane, defamatory, or malicious" as to lose the protection of the Act.[7] He accordingly found that the Respondent violated Section 8(a)(1) by discharging Ahern for engaging in protected concerted activity.

The Respondent argues, among other things, that Ahern lost the protection of the Act by deliberately falsifying the name of the sender of the package, and that Ahern was legitimately discharged for engaging in that misconduct. We agree with the Respondent.[8]

The Board has held that where "an employee is discharged for conduct that is part of the res gestae of protected activities, the relevant question is whether the conduct is so egregious as to take it outside the protection of the Act, or of such character as to render the employee unfit for service." *Guardian Industries Corp.*, 319 NLRB 542, 549 (1995), citing *Consumers Power Co.*, 282 NLRB 130, 132 (1986). Activity that would ordinarily be protected under the Act may lose its protection if it "includes defamatory statements, bad-faith conduct, or deliberate and malicious falsehoods." *HCA/Portsmouth Regional Hospital*, 316 NLRB 919, 930 (1995).

[5] The rules read as follows:

> 19. Deliberate falsification of work sheets, official Company administrative forms, personnel or employment records, medical documentation, testimony at a Peer Review hearing, production records, etc.
>
> 21. Displaying immoral conduct, participating in harassment of any nature toward or about any Associate of the company.
>
> 31. Posting of materials, or the creating of graffiti with racial, sexist or religious symbols, or threatening commentary which do not reflect Ogihara's Core Values and may be intimidating to other Associates.

[6] The judge found that Ahern was not motivated by a desire to replace Pierson on the first shift because Ahern already knew that another first-shift employee, Gary Babbitt, was retiring in August and that Ahern was in line to replace him. The judge also found that Ahern attempted to insulate Pierson from responsibility for sending the letter by handwriting it and listing a clearly incorrect home address and telephone number.

[7] The judge also noted that the Board has "countenanced similar conduct" where an employee, in good faith, forged other employees' signatures on grievance forms, citing *OPW Fueling Components*, 343 NLRB No. 111 (2004), enfd. 443 F.3d 490 (6th Cir. 2006); *Roadmaster Corp.*, 288 NLRB 1195, 1196 (1988), enfd. 874 F.2d 448 (7th Cir. 1989).

[8] The Respondent also claims that Ahern lost the protection of the Act by falsely portraying Gaffka's job performance. We do not reach that issue. For purposes of this discussion, we assume arguendo that Ahern, Simmons, and Griswold were engaged in protected concerted activity when they complained about Supervisor Gaffka's work, and that nothing in the content of the package lost that protection.

As set forth above, we assume arguendo that the complaints against Gaffka were protected and that those complaints did not lose their protection because of their alleged falsity. We find, however, that Ahern lost the protection of the Act because of his intentional falsification of the name of the sender of the package. We conclude, contrary to the judge, that Ahern's deliberate deception was so egregious as to remove the sending of the package from the protection of the Act.

The Board has held that "deliberate falsity" can cause an employee to lose the protection of the Act.[9] Similarly, activity designed "to destroy the reputation and end the employment of another employee" has also been found to have lost protection.[10] Ahern's use of Pierson's name on the package was a "deliberate falsity" that had the potential of harming Pierson's reputation and jeopardizing his employment. At the time Ahern used Pierson's name on the package, Ahern feared that the Respondent would retaliate against the sender of the package. Nevertheless, Ahern engaged in a deliberate deception by listing Pierson as the sender of the package, even though Ahern knew that Pierson had not authorized the use of his name. Ahern thereby implicated Pierson in activity that Ahern himself believed would anger the Respondent. That Ahern may not have affirmatively intended to harm Pierson, and may have believed that the use of a fictitious address would ultimately absolve Pierson of any actual repercussions from the sending of the package, is not determinative. The fact remains that Ahern's deliberate falsification posed a substantial risk to Pierson's reputation and employment status. Consequently, Ahern's misconduct is sufficiently egregious to cause him to lose the protection of the Act.[11] Because Ahern was discharged for his falsification on the label of the package he sent the Respondent, which falsification was unprotected, we conclude that Ahern's discharge did not violate Section 8(a)(1) of the Act.

B. The 8(a)(3) Discharge Allegation

The complaint alleges, and the judge found, that Ahern's discharge also violated Section 8(a)(3) of the Act. In so finding, the judge applied *Wright Line*[12] and found that the General Counsel had met his burden of showing that Ahern's union activity was a motivating factor in the Respondent's decision to discharge him. The judge also found that the Respondent had not met its *Wright Line* burden of showing that it would have discharged Ahern for his conduct when sending the package even in the absence of his union activity. In finding that the Respondent had not met its burden, the judge stated that "the Respondent did not have legitimate grounds for disciplining Ahern." We disagree with the judge.

As we have found, the Respondent did have "legitimate grounds for disciplining Ahern," i.e., his unprotected conduct of deliberately falsifying the name of the sender of the package. Further, it is apparent from the August 4 letter of termination that the Respondent relied on those legitimate grounds in discharging Ahern. The Respondent continues to maintain that Ahern's use of Pierson's name on the package alone justified the termination. Thus, we disagree with the judge's finding that the Respondent's reasons were "shifting and pretextual." Further, the Respondent considered Ahern's conduct to have violated several of its rules of conduct. There has been no showing that the Respondent failed to discharge other employees who engaged in comparable misconduct.

In sum, assuming arguendo that the General Counsel established that Ahern's union activity was a motivating factor in the Respondent's decision to discharge Ahern, we find that the Respondent has met its burden of showing that it would have discharged Ahern for his deliberate falsification, even in the absence of Ahern's union activity. Therefore, we reverse the judge's finding that Ahern's discharge violated Section 8(a)(3) of the Act, and we shall dismiss this allegation of the complaint.

C. The 8(a)(4) Discharge Allegation

The complaint also alleges, and the judge found, that Ahern's discharge violated Section 8(a)(4) of the Act. The judge found that Ahern's discharge was related to his testimony at the May 25 hearing before Judge Carson. In so finding, the judge relied heavily on the "suspicious" timing of the discharge, which occurred less than 1 month after Judge Carson issued his decision rec-

[9] *Guardian Industries*, supra, 319 NLRB at 549.

[10] *HCA*, supra, 316 NLRB at 931.

[11] *OPW Fueling Components*, supra, 343 NLRB No. 111, and *Roadmaster Corp.*, supra, 288 NLRB 1195, relied on by the judge, are distinguishable. Neither of those cases involved falsehoods intended to implicate another individual in activity that the employee feared would provoke employer reprisals. In addition, the falsehoods in those cases were connected to the initiation of grievance procedures and were arguably necessary to preserve employees' grievances. By contrast, here there was no necessary link between the falsity and the complaints raised by the employees. Although the judge found that the use of Pierson's name aided in the employees' quest for anonymity, Ahern did not need to falsify the name of the sender of the package in order to have the employees' complaints brought before the Respondent. Thus, Ahern's falsity is not analogous to the ones in the prior cases, which were found to be either "part and parcel of the grievance procedure," *OPW Fueling Components*, supra, 343 NLRB No. 111, slip op. at 4, or "part of the res gestae of the grievance procedure," *Roadmaster*, supra, 288 NLRB at 1197.

[12] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

ommending a new election. Contrary to the judge, we find that the General Counsel has not met his burden of showing that Ahern's testimony before the Board was a motivating factor in the Respondent's decision to discharge him.

Although the timing of a discharge may sometimes suggest an unlawful motive, in this case the timing fails to establish a nexus between Ahern's testimony and the decision to discharge him. Rather, the timing of the discharge was related to the Respondent's discovery of Ahern's deception. The Respondent learned on August 2 that Ahern sent the package. On August 3, after Ahern was confronted with, and falsely denied, his misconduct, he was promptly discharged. Thus, the record evidence undercuts the judge's speculation regarding a possible relationship between Judge Carson's decision and the decision to terminate Ahern. Accordingly, we find that the evidence fails to establish that Ahern's discharge related to his Board testimony, rather than to his unprotected activity in connection with the sending of the package.

For these reasons, we find that Ahern's discharge did not violate Section 8(a)(4) and (1) of the Act. Accordingly, we shall dismiss this allegation.

D. Interrogations

The judge found that the Respondent violated Section 8(a)(1) of the Act on June 11, when Casady interrogated Pierson about the package, and again on August 3, when Ahern was called to Casady's office and interrogated about his involvement with the package. We disagree.

The Respondent interrogated both Pierson and Ahern as to whether they sent the package. As discussed above, we have found that the sending of the package under false pretenses was not protected. The Respondent's interrogations of Ahern and Pierson in an effort to determine who sent the package were merely part of the Respondent's legitimate investigation of unprotected conduct. Accordingly, we find that the interrogations would not reasonably tend to restrain, coerce, or interfere with rights guaranteed by the Act. See, e.g., *HCA*, supra, 316 NLRB at 931 (interrogation did not violate the Act where "the conduct about which the interrogation took place was not protected"). We shall therefore dismiss this allegation.

E. Alleged Threat

The judge found that after Ahern's discharge, Casady told employees that unnamed plaintiffs had commenced a lawsuit for $25,000 against the sender of the package, but if the Union was found to have been involved, the plaintiffs "may go in [the] direction" of suing for $25 million.[13] The judge noted that Casady did not qualify his statement regarding the lawsuit to exempt Ahern from such additional monetary exposure. Because the Union was not a defendant, and there was no indication that it would become a defendant, a "reasonable understanding" by employees who heard Casady's remarks would be that Ahern could be liable for up to $25 million for engaging in protected concerted activity. The judge found that under these circumstances, Casady's statement was "objectively calculated" to restrain employees in the exercise of their Section 7 rights and therefore violated Section 8(a)(1).[14]

For the following reasons, we agree with the judge that the Respondent's threat was coercive and violated Section 8(a)(1). The Respondent's statement that the plaintiffs in the lawsuit would seek $25 million (rather than $25,000) if the Union were found to have been involved in the sending of the package conveyed the message that Ahern could be liable for a much larger damage award if he engaged in union activity. Although we have found that the sending of the package was unprotected, Casady's threat that Ahern would be liable for additional damages if the Union participated in sending the package was nevertheless coercive because it implied that there could be an additional monetary penalty for involvement with the Union. Such a statement would reasonably tend to interfere with the employees' willingness to seek the Union's assistance and to involve the Union in workplace issues, and would thereby restrain employees in the exercise of their Section 7 right to engage in union activity. Accordingly, we agree with the judge that the statement violated Section 8(a)(1) of the Act.

AMENDED CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening employees with a monetary penalty if they engage in union activity, the Respondent violated Section 8(a)(1) of the Act.

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[13] The judge discredited Casady's testimony that an employee, rather than Casady, suggested the $25 million figure.

[14] The judge distinguished his prior decision in *Richard Lawson Excavating, Inc*., Case 6–CA–33928 (2005), a case cited to him by the Respondent. In its exceptions, the Respondent continues to rely on the judge's decision in *Richard Lawson Excavating*. However, on May 27, 2005, the Board issued an Order in *Richard Lawson Excavating* granting a joint motion to remand the proceeding to the Regional Director for further appropriate action pursuant to the terms of a non-Board resolution. Accordingly, no Board decision was issued in *Richard Lawson Excavating* and that case does not constitute a precedent.

4. By engaging in the conduct described above, the Respondent has committed unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Respondent has not otherwise violated the Act as alleged.

ORDER

The National Labor Relations Board orders that the Respondent, Ogihara America Corporation, Howell, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with a monetary penalty if they engage in union activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Howell, Michigan, copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 17, 2004.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 30, 2006

Robert J. Battista, Chairman

Peter C. Schaumber, Member

Peter N. Kirsanow, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten employees with a monetary penalty if they engage in union activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights set forth above.

OGIHARA AMERICA CORPORATION

Erikson C. N. Karmol and *Jennifer Y. Brazeal, Esqs.*, for the General Counsel.

Russell S. Linden and *Sean F. Crotty, Esqs. (Honigman, Miller, Schwartz and Cohn, LLP),* of Detroit, Michigan, for the Respondent.

Bruce A. Miller, Esq. (Miller Cohen, PLC), of Detroit, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Detroit, Michigan, on May 17–19, 2005. The charge in Case 7–CA–47942 was filed by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO (the Union) against the Ogihara America Corporation (the Respondent) on September 29, 2004.[1] The charge in Case 7–CA–48024 was filed by Leo Andre Ahern (Ahern) on October 22. An order consolidat-

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] All dates are in 2004 unless otherwise indicated.

ing cases, consolidated complaint, and notice of hearing issued on November 23.

This proceeding involves the commission of alleged unfair labor practices by the Respondent in the aftermath of the Union's 2003–2004 organizing campaign and during the pendency of the Board proceeding that followed. The consolidated complaint alleges the unlawful discharge of Leo Andre Ahern, an active union supporter, on August 3 in violation of Section 8(a)(1), (3), and (4) of the National Labor Relations Act (the Act). It also alleges three violations of Section 8(a)(1): the coercive interrogation of employee Bruce Pierson on June 11; the coercive interrogation of Ahern, the discriminatee, on August 3; and, later in August, threatening employees that the Respondent would seek additional money damages against Ahern if it was determined that the Union had any involvement in his protected concerted activity. The Respondent's answer denies any violations of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation with an office and place of business in Howell, Michigan, is engaged in the manufacture and nonretail sale of automobile parts. In conducting its business, the Respondent annually derives gross revenues in excess of $500,000, and purchases and receives goods and materials valued in excess of $50,000 directly from points located outside the State of Michigan. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent further admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The 2003–2004 Organizing Campaign

This controversy has its genesis in the organizing campaign undertaken by the Union and the Respondent's employees in October 2003. The Respondent responded to that effort by holding mandatory group meetings with employees to express its views regarding unionization. At these meetings, the Respondent's management staff implored employees to reject union affiliation.[2] Those views, however, were already well known to employees based on the Respondent's associate handbook (employee handbook), which was effective March 1, 2002.[3]

> At Ogihara America Corporation, every member of the management team is committed to the Company's philosophy of fair and impartial treatment of our Associates at all times. Associates are always free to speak to their Facilitator/Supervisor, or any member of the management team, to raise and get answers to any questions that may be on their minds. Every Associate is treated as an individual and as an important participant in the operation of our Company. We hope to maintain this open and longstanding relationship.
>
> Ogihara America Corporation strongly believes that individual consideration in Associate-supervisory relationships provides the best climate for maximum development of teamwork and the attainment of our goal. We do not believe union representation for our Associates would be in the best interest of our Associates, the Company or our customers.
>
> We have enthusiastically accepted our responsibility to provide you with good working conditions, good wages and benefits, fair treatment and the personal respect, which is rightfully yours. This is our commitment to each other and need not be "purchased from an outside third party." The dues, initiation fees, possible fines, assessments and costs imposed by unions on their members are unnecessary burdens. Threats of strike and conflict create an antagonistic environment.
>
> At our Company, you have the opportunity to express your problems, suggestions, and comments to us directly so we can understand them better. We can continue this longstanding policy without a union. We will continue to listen and do our best to be responsive to your needs.

On December 15, 2003, the Union filed a representation petition in Case 7–RC–22589. On December 23, 2003, the Regional Director approved a stipulated agreement between the Union and the Respondent providing for a representation election by the Respondent's 323 full-time and regular part-time production and maintenance employees.

The representation election was conducted on January 9. The Union received 148 votes, 150 employees voted not to be represented by the Union, and the Union challenged 9 ballots. The Union subsequently withdrew its challenges, resulting in 159 votes against representation.[4] On January 16, the Union 16 filed objections to the election. On January 21, the Union filed unfair labor practice charges alleging that the Respondent illegally disciplined employee Stefan Mikulka because of his union activities. On April 6, the Regional Director issued complaints in Cases 7–CA–47071 and 7–RC–22589, and consolidated them for hearing.

A hearing was held before Administrative Law Judge George Carson II on May 25. On July 12, Judge Carson concluded that the Respondent violated Section 8(a)(1) by "interfering with the right of employees to distribute protected union literature in nonworking areas when neither of the employees involved is on working time." He also concluded that the Respondent violated Section 8(a)(1) and (3) by disciplining employee "Stephan Mikulka for distributing protected union literature in a nonworking area when neither Mikulka nor the recipient to whom he distributed the literature was on working time." As a result, Judge Carson issued an order setting aside the election and permitting the Regional Director "to conduct a second

[2] This finding is based on the unrefuted testimony of employee Thomas Griswold and former employee Michael Daniels. Tr. 223, 337–338.

[3] GC Exh. 4 at 11–12.

[4] GC Exh. 7(a)–7(c).

election when he deems the circumstances to permit a free choice." On November 30, the Board issued a decision essentially upholding Judge Carson's decision.[5]

B. The Charging Party's Concerted Activity

Ahern, a press maintenance technician on the second (afternoon/evening) shift, played an active role in the organizing campaign. He attended all of the campaign meetings prior to the election on January 9, wore and displayed union insignia, engaged in union-related discussions while at work, distributed authorization cards and union literature, served as an observer during the election, and was the only employee involved in counting the votes. During the counting, the Respondent's president, Tokio Ogihara (Ogihara), was present along with Human Resources Manager Director Patrick Casady, Production Manager Michael Zimmerman, Executive Manager John Ruhman, and other management personnel. Ahern was also one of several employees who testified on behalf of the Union at the hearing before Judge Carson. There were at least five managers present in the hearing room as he testified: Zimmerman, Casady, Jeffrey Hughes, Scott Thompson, and Gayle Courtman.[6]

Ahern's concerted activity was not, however, limited to the organizing campaign, the election, and his hearing testimony. In March, another press maintenance technician, Michael Daniels, was terminated. Ahern and several other employees felt that Daniels was unjustly discharged. Ahern telephoned Casady and requested a meeting to discuss the termination. Later that day, Ahern, Christopher Simmons, and Steve Aness approached Casady and expressed their concerns. Casady agreed to look into the matter. He got back to Ahern later that day. Casady told him that Daniels' supervisor recommended termination because he did not complete projects on time. Ahern disagreed with that explanation, but Casady did not respond.[7]

Subsequently, Ahern turned his focus toward David Gaffka, the third-shift press maintenance facilitator. Prior to July 12, Gaffka, along with Bruce Russell, jointly supervised the second shift. On July 12, Michael Killips was hired as the second-shift supervisor. Between May 25 and July 12, Ahern, Griswold, and Simmons, all second-shift press maintenance technicians, frequently discussed Gaffka. They were troubled that Gaffka, a known opponent of the Union, was complaining to supervisors in other departments about the substandard work of their employees, while "the quality of his own work wasn't that high." The tipping point, however, was when Simmons saw Gaffka harass another employee in the tool room and then wrote him up for shoddy workmanship.[8]

1. The letter

Disturbed by their belief that the quality of Gaffka's work contradicted his expectation of employee performance, Ahern, Griswold, and Simmons decided to try to have him demoted. They spoke previously to another press maintenance facilitator, Bruce Russell, and Assistant Department Manager Brett Poe about Gaffka's work. However, no one followed up on their complaints.[9] Accordingly, they decided to write an anonymous letter to Ogihara. Ahern agreed to draft it. After showing Simmons and Griswold a draft, Ahern incorporated their suggested changes. In addition, Simmons supplied photographs demonstrating Gaffka's work to include with the letter. He either took the photographs or they were already stored on his computer.[10] The letter, dated June 2 and addressed to Ogihara, stated:

> We are writing to you as a group of associates both concerned, and disturbed by the conduct and behavior of one of your Press Maintenance Facilitators—Dave Gaffka. On several occasions, Dave has approached Troy Burley and other managers making accusations of alleged mistakes made by their associates in their work. Dave was threatening that he would have people written up. Dave has been mistaken in many of these accusations—even accusing people of things that happened on days they were not even at work. This shows no regard for core values.
>
> We feel that Dave lacks the professionalism [sic], technical skills, and the people skills necessary to be a facilitator at OAC. As a facilitator he is a representative of OAC and creates a bad image of this company. In this time of corporate cost cutting, we respectfully request that you personally investigate Dave's usefulness and impact to OAC. Turning this matter over to your management team will not solve the problem, as some of your managers promote this behavior. It is your choice to act on this matter or not to, however many associates would welcome the thought of you taking a more active part in managing the managers at OAC. If you choose not to respond please keep this confidential.
>
> Enclosed are photos of Dave's own poor workmanship.
>
> Thank you for your attention to this problem.

2. The photographs

Ahern, Griswold, and Simmons enclosed 11 photographs fairly and accurately depicting areas, equipment, or machinery

[5] *Ogihara America Corp.*, 343 NLRB No. 91, slip op. at 2–4, 10–11 (2004).

[6] Ahern's union activity is not in dispute. Tr. 26–33, 87–88, 93–95, 98–100; GC Exh. 6(a). Simmons, Daniels, and Griswold all credibly testified that he was a leader in the campaign. Tr. 162, 218, 336, 400.

[7] This exchange is background only and not the subject of a charge. Tr. 34–36, 164–165.

[8] Ahern testified as to his belief that Gaffka's work was not very high. Tr. 36–39. Simmons testified that Gaffka's work was "usually quite sloppy" and created more work for others. Tr. 166–167. Griswold testified that many employees were dissatisfied with the quality of Gaffka's work. In addition, Gaffka treated other employees poorly. Tr. 340, 370–373.

[9] Neither Russell nor Poe was called to rebut the credible testimony of Ahern, Simmons, and Griswold regarding their views and complaints about the quality of Gaffka's work. Tr. 53, 56, 61, 114, 180, 199, 344–354. I did not, however, rely on Daniels' testimony that Brett Poe often referred to Ahern as "angry Andy" and stuck his tongue out at him behind his back. Although this occurred on one occasion during the height of the organizing campaign, there was no clear indication that it was due to Ahern's allegedly "angry" nature, his union support or something else. Tr. 225–227.

[10] Tr. 39–40, 167–170, 339–340, 388; GC Exhs. 8(b), 9.

where Gaffka worked at or with during the period of 2000 to 2004 that required corrective action. They were familiar with Gaffka's work because it was their respective jobs to repair equipment and machinery.[11] Ahern, in particular, was well qualified as a press maintenance technician, having served in that capacity since 1989.[12]

Photograph 1 depicted a hole in an electrical junction box and cord with exposed wires that was installed by Gaffka in 2000. The installation violated electrical code standards and presented a shock hazard. The caption beneath the picture asked, "Is this up to NEC Code Standards?" The answer that followed stated that "[a] cord should never enter a junction box without use of a grommet or strain relief. This is a serious violation of the NEC Standards."[13]

Photograph 2 showed a B-line vision system installed by Gaffka in 2001. The caption beneath the photograph stated, the "B-Line vision system hasn't worked for a long time." The Respondent was aware that the system had not been operational for a while and was considering replacing it. The unavailability of the vision system made B-line production more difficult.[14]

Photograph 3 depicted five electrical wiring panels installed by Gaffka in 2000. The caption stated, "No numbering on wire labels on the left. This is difficult to work on and could be hazardous. Installed by David Gaffka." The fact that these panels were unlabeled made it more difficult and hazardous to trace the wiring and determine the electrical voltage carried by each.[15] Griswold complained about this condition to Russell.[16]

Photograph 4 depicted another electrical wiring panel installed by Gaffka in 2000. The caption states that "[t]his is common of Dave, no labels." This electrical panel did, in fact, create difficulty for Griswold when he had to replace the system in December 2004. As a result, he needed to consult with Gaffka to determine the nature of the wiring involved.[17]

Photographs 5 and 6 depict a press loader. However, photograph 5 showed an energy-saving vacuum pump that Gaffka installed on the loader, while photograph 6 showed the loader before the pump was installed. The caption on photograph 5 urged the reader to "compare this loader with the next page to see the extra equipment installed. It doesn't seem necessary, it costs more in downtime." The caption on photograph 6 asserted that it depicted "a nice clean loader, has worked fine for a long time." The operation of this pump system gave rise to problems and resulted in the loss of productivity over a 7-month period.[18]

Photograph 7 provided yet another fair and accurate portrayal of an unlabeled electrical wire panel. The caption described the photograph as a display of "exposed wiring, poor connections, lack of labels." The panel was among several that had either been wired or supervised by Gaffka. The installation caused the alarm system to malfunction and created problems for Griswold and Simmons; Griswold found it hard to troubleshoot the system since he did not know where to connect some of the wiring, while Simmons once received an electric shock when the wiring became loose.[19]

Photographs 8 and 9 depicted areas where Gaffka performed work and are each captioned as "a picture of a work area after Dave had finished." Photograph 8 showed a ladder lying on the ground and posed a tripping hazard. Photograph 9 depicted an uncovered gearbox with a rotating drum that could cause serious injury to a worker's hand.[20] In any event, the conditions

[11] Ahern, Simmons, and Griswold provided fairly consistent and credible testimony regarding their familiarity with the conditions depicted in the photographs. Tr. 48–49, 128, 131–132, 156, 171, 187, 201, 354, 398.

[12] Ahern had an associate's degree in robotics technology and completed several training courses given by the Respondent in welding, operations, and statistical control. GC Exh. 3(a).

[13] It was undisputed that Gaffka performed this installation and that it required repair work. GC Exh. 9(1); Tr. 49–51, 176, 342, 587–591, 623.

[14] Ahern credibly testified that he saw Gaffka install the system in 2001, while Casady conceded that this was Gaffka's work and there was "nothing" false about the picture. GC Exh. 9(2); Tr. 52, 506, 535, 591. In addition, Simmons credibly testified that the nonfunctioning system would have made the work of B-line operators more difficult. Tr. 178.

[15] It is undisputed that Gaffka installed the wiring in or around 2000. Tr. 54–55, 593. In addition, Griswold, Simmons, and Daniels credibly testified that this condition made "troubleshooting virtually impossible." Tr. 180, 228, 345. Gaffka, on the other hand, asserted that the unlabeled wiring did not create a problem with safety or production. Tr. 594. He did admit, however, that maintenance technicians would have to troubleshoot the system. Tr. 605.

[16] This finding is based on Griswold's credible testimony that he discussed this condition with Russell. Tr. 346. I did not, however, credit Ahern's uncorroborated hearsay testimony that Russell, in turn, discussed the condition with him. Tr. 56.

[17] It is also undisputed that Gaffka installed this panel. Tr. 57, 594. Furthermore, Griswold's credible testimony that the condition delayed his work was corroborated by Gaffka's concession that maintenance technicians would be responsible to perform repairs on any of the wires involved in the picture. GC Exh. 9(4); Tr. 347–348, 605.

[18] Gaffka concurred with Ahern, Simmons, and Griswold that problems with the pump, which he installed, resulted in production problems over a 7-month trial period. GC Exh. 9(5)–(6); Tr. 59, 182–183, 348–350, 603, 613. Furthermore, Casady conceded that criticism over the pump, which cost "tens of thousands of dollars," was not a dischargeable offense. Tr. 509, 536–537.

[19] Simmons and Griswold credibly testified that Gaffka was responsible for this project. In addition, Ahern and Simmons credibly testified that they discussed this problem with Russell. GC Exh. 9(7); Tr. 61–62, 184, 351–352. Gaffka did not refute their contention that he was responsible for this work and, in fact, conceded that he installed the wiring on some of these machines. He also conceded that the exposed wiring shown created a safety problem for maintenance technicians. GC Exh. 9(7); Tr. 598–599, 605, 614.

[20] I did not find Casady to be a credible witness. His testimony was permeated by inconsistent, shifting versions of his conversations with the persons affected by the package—Pierson and Gaffka. In any event, Casady testified that Gaffka denied leaving the mess shown in the photograph, but did not deny that he worked in that area. Tr. 538, 601. Casady also conceded that there was "nothing" false about photograph 8. Tr. 537. Accordingly, I based this finding on Ahern's credible testimony that he saw Gaffka descend from the top of the press on a ladder when this work was done during the 2004 Easter holiday shutdown. Tr. 62–63.

depicted in the photographs violated the Respondent's policy that work areas be cleaned up at the end of each shift.[21]

Photographs 10 and 11 depict the electrical outlet connections for the B-line vision system. The caption for photograph 10 states, "Note the one cord plug in below, two power strips, one cord." Photograph 11 did not have a caption, but showed an electric cord plugged into an outlet. The photographs fairly and accurately depicted the vision system's electrical connections, which Gaffka worked on in 2003 and 2004.[22] Ahern, Simmons, and Griswold felt that the condition shown presented a problem for the maintenance technicians.[23]

3. The transmission of the letter and photographs

Ahern, Simmons, and Griswold decided to transmit the letter and photographs (the package) anonymously due to their concern about reprisal if they signed their names. On June 9, Ahern went to the Federal Express (FedEx) service desk at a Kinko's office supply store in Novi, Michigan, to mail the package. A Kinko's employee instructed Ahern to complete the sender and return address information on the FedEx label. However, given the anonymous nature of the package and his belief that the Respondent would be hostile toward him because of his union activity, Ahern decided against using his own name and address on the label. Another press maintenance technician, Bruce Pierson, was the first person to come to mind, and Ahern listed his name instead.[24] At the time, Ahern knew that Pierson, a first (day) shift employee, was opposed to union affiliation and, therefore, listing his name on the return address would be more likely to evoke a response from Ogihara.[25] As a return address, Ahern looked in the telephone book, came up with the address for the county courthouse—204 Highland Way, Howell, Michigan 48843—and wrote it and a fictitious telephone number on the label.[26]

4. The Respondent's formal complaint procedures

The approach used by Ahern to transmit the package is the major issue in this case. By sending a confidential letter directly to Ogihara, he and his cohorts ignored two approaches prescribed in the Respondent's employee handbook for submitting concerns to management: an open door policy and a "blue press" procedure.

The Respondent's "open door philosophy" provides a process for the submission of job-related concerns. The process starts with a consultation with that employee's facilitator/supervisor, but provides for an initial consultation with "a member of Management concerning a private matter." It further states that "[y]our concerns will remain confidential while being addressed promptly and with respect." The "problem solving" procedure that follows notes that it is an employee's right to take any concern "'to the top,' if you wish" and provides four steps an employee can take:

> 1. Discuss the issue that is bothering you with your immediate Facilitator/Supervisor. He/she works with you every day and is personally interested in your welfare. He/she knows you and your job better than anyone else and can help address your concerns promptly and fairly.
>
> 2. If your concern has not been satisfactorily resolved, or if there is some reason you do not wish to bring the problem to your Facilitator/Supervisor, you may take the problem to your Department Manager or Assistant Department Manager. Talk open and frankly with him or her. He or she will make every reasonable effort to resolve your problem at this level.
>
> 3. In the event your problem has not been satisfactorily resolved, you may contact an Associate Relations Representative. He or she will listen to your concerns, and discuss possible solutions with you.
>
> 4. If all other attempts at solving your concern have been unsuccessful, you may make advance arrangements to meet with any member of staff, management team, or the Company President as a final step. Their door is open to you.[27]

The next section in the employee handbook contains the Respondent's "Employment Philosophy." That section states, in pertinent part, that "[a]ssociates are always free to speak to their Facilitator/Supervisor, or any member of the management team, to raise and get answers to any questions that may be on their minds."[28]

The Respondent's blue press procedure began in March 2004, and invites employees to submit opinions, complaints, and concerns to a group of four employees. That group is responsible to "collect concerns from the boxes regularly and will analyze and compile them for trends. They will then be taken to Management to determine if something can be done to cor-

[21] It was not disputed that this messy condition was unacceptable. Tr. 64, 185, 352, 510.

[22] Simmons and Griswold credibly testified that they saw Gaffka work on the equipment over a period of time in 2003 and 2004. Tr. 201–203, 353.

[23] Gaffka and Casady confirmed the credible testimony by Simmons and Griswold that the conditions depicted made troubleshooting difficult and needed to be cleaned up. Tr. 187, 511, 539, 541. Gaffka also confirmed that the wiring was cramped and complicated the work of maintenance technicians. Tr. 598, 606.

[24] The weight of the credible evidence supports the testimony of Ahern, Simmons, and Griswold that they initially intended to send Ogihara an anonymous package and that it was Ahern's decision to add Pierson's name at the FedEx service desk. Tr. 45, 205, 378.

[25] I credited Ahern's assertion that he did not use Pierson's name for the purpose of getting him fired, thereby enabling Ahern to move into the more desirable first shift. Although Ahern would have preferred to be on the day shift, he was next in line for an opening on the day shift and Gary Babbitt, a maintenance technician on the day shift, had announced previously that he would be retiring in August. He, in fact, did retire in August. Tr. 120, 150–151, 155, 210.

[26] Under the circumstances, I credited Ahern's assertion that he reasonably believed that the package would not result in the Respondent taking adverse action against Pierson. Tr. 70–72, 102, 120–122, 143. First, Pierson was opposed to the Union. Secondly, it would be obvious to an employer that an employee openly filing a written complaint with management would be unlikely to use a fictitious address. Indeed, Casady confirmed this when he cross-referenced Pierson's home address on file with the telephone book. Tr. 542–543.

[27] GC Exh. 4, p. 11.

[28] Id.

rect the concerns. Follow-up to OAC Associates will be provided through newspaper articles."[29]

Ahern, Griswold, and Simmons never considered using the blue press procedure. Although the procedure provided for confidentiality and anonymity, they wanted their complaint to go directly to the top.[30] Furthermore, they were also aware of the fact that the blue press procedure did not result in a response to every complaint or suggestion.[31]

C. The Respondent's Response to the Charging Party's Concerted Activity

Ogihara received the package on June 10. At his direction, Zimmerman met with Casady and asked him to investigate the allegations in the letter. As Casady's technical knowledge of the photographed equipment was limited, however, he directed Ruhman to investigate the allegations.[32] Casady also decided to meet with Pierson.

On June 11, Casady met with Pierson. He showed Pierson the letter and pictures, and asked if he had seen them before. Pierson denied sending them. Casady believed him, since he had checked out the return address on the package and already determined it was not Pierson's home address. Nevertheless, Casady continued to interrogate Pierson in an attempt to determine who sent the package. Casady even asked Pierson whether he might have enemies who may have sent the package in his name. Pierson maintained that he did not know. During this meeting, which lasted approximately 20–30 minutes, Casady did not tell Pierson that Gaffka was being investigated.[33]

At or around the time that Casady was meeting with Pierson, Ruhman gave a copy of the photographs to Brett Poe, a maintenance manager. Poe, in turn, showed the photographs to Gaffka. Gaffka merely "flipped through" the photographs and returned them to Poe; he did not go to the areas depicted in the photographs for a comparison. Gaffka spoke to Ruhman the following day. He confirmed that he was responsible for some, but not all, of the conditions depicted in the photographs.[34] This was undoubtedly an act of self-preservation on Gaffka's part, as he knew that Ruhman was "very close to Mr. Ogihara." Aside from that discussion with Gaffka, Ruhman did not investigate the conditions depicted in the photographs.[35]

Ruhman reported Gaffka's comments to Casady and Zimmerman at a meeting on or about June 21.[36] Ruhman confirmed that the photographs were accurate representations of the objects depicted and either warranted corrective work or were already under review. These conditions included: an inoperable vision system in photograph 2; unlabeled and improper wiring in the photographs 3 and 4; an experimental piece of compressor-related equipment that cost "tens of thousands of dollars" in photographs 5 and 6; a messy and unprofessional work area in photographs 8 and 9; and improper electrical wiring that "needed to be cleaned up."[37]

Nevertheless, even though he knew that the mere transmission of the letter did not violate any of the Respondent's procedures and that the photographs had merit, Casady was still determined to find out who sent the package.[38] On or about June 21, Casady went to Kinko's and spoke with Lee Flamard, the assistant store manager. Flamard informed Casady that Kinko's possessed a videotape for the day the package was sent, but he could not release it without a subpoena. Casady returned to his office and met with Gaffka for the purpose of eliciting his participation in a lawsuit against the person sent

[29] GC Exh. 10; Tr. 45.

[30] Tr. 42, 119, 189, 379.

[31] Griswold credibly testified that, although the blue press was never officially dismantled, it was not really active. He used it once in March 2004 to send a letter with four concerns, but the Respondent never posted a response to three of his concerns. Tr. 355–356. Simmons testified that the blue press suggestion boxes had "become pretty much a garbage bin." Tr. 188–189.

[32] Ruhman did not testify, but there is no dispute as to Casady's initial action. Tr. 430–431, 498–504, 558, 567.

[33] Casady's testimony regarding his conversation with Pierson was simply not credible and, instead, I relied on Pierson's credible version of the meeting. Pierson testified that Casady told him they were trying to determine who sent the package. Upon denying it, Casady asked whether Pierson might have enemies who may have sent the package. There was no mention of an investigation into Gaffka's work. Tr. 250–258. Casady, on the other hand, initially testified that he met with Pierson in order to "get a better understanding of what the issues were regarding Mr. Gaffka" and had no reason to doubt Pierson's statement that he did not send the package. He conceded, however, that he could have investigated the allegations without talking with the sender of the package. Tr. 498–499. Casady later changed his testimony by asserting that he had lingering doubts about Pierson's denial. Tr. 543–548.

[34] The evidence as to the dates is spotty, but it appears that this discussion occurred within several days after Ogihara received the package. Tr. 626–627.

[35] Gaffka testified that Poe, Ruhman, and Casady never asked him whether he performed the work depicted in the photographs. Tr. 601, 621. Casady, on the other hand, provided conflicting accounts of Gaffka's role. In one instance, he testified that he did not know why Ruhman directed Gaffka to investigate himself. Tr. 558. In other instances, he conceded that he actually relied on Gaffka to conduct an investigation of his own conduct. Tr. 479, 567–568.

[36] Although Ruhman did not testify, I credit Gaffka's testimony that he spoke to him about the photographs during this period of time. Tr. 627. However, Casady and Gaffka provided conflicting testimony as to whether Gaffka attended this meeting, which took place within 1 to 2 weeks after the package arrived. Casady provided inconsistent testimony as to whether Gaffka attended, while Gaffka testified that he met separately with Casady, just before the lawsuit was filed. Tr. 502–504, 585. I found Gaffka to be the more reliable witness and adopted his version.

[37] Casady conceded that either Ruhman or Gaffka was going to issue appropriate work orders. Tr. 505–512, 535–541. Furthermore, the General Counsel, relying on *International Automated Machines*, 285 NLRB 1122, 1123 (1987), requested an adverse inference that Ruhman, a current supervisor who was not called as a witness by the Respondent, would not have testified that the Respondent conducted a meaningful investigation of the allegations. GC Br. at 49. I grant that request. See also *K-Mart Corp.*, 336 NLRB 455 (2001); *Jim Walter Resources*, 324 NLRB 1231, 1233 (1997).

[38] Casady was not credible in his assertion that he needed to ascertain who sent the package in order to "find out what the issues were and try to determine who had the issues so that we could further investigate Mr. Gaffka." Tr. 431–433. He subsequently conceded that he could have investigated the allegations without speaking to the person who sent the package. Tr. 498–499.

the package.[39] Casady showed Gaffka the envelope, letter, and photographs. Gaffka merely looked at the photographs and told Casady that "a lot of these were not correct." Casady responded that the Respondent was "doing an investigation into the whole package." However, Casady did not request that Gaffka provide him with a verbal or written response to the allegations in the letter and photographs.[40] In fact, even though he spoke to several people during his investigation into the package, Casady kept no notes regarding any of these conversations.[41]

Casady got Gaffka and Pierson to agree to be named plaintiffs in a legal action. On June 28, the Respondent arranged for its counsel in this proceeding to commence a lawsuit in Livingston County Circuit Court on behalf of Gaffka and Pearson. The complaint charged "John Doe" defendants with defamation and tortuous interference with their employment when they sent the package to the Respondent. In connection with that action, the Respondent requested issuance of a subpoena to Kinko's for the production of the videotape.

In the meantime, several weeks passed without any significant events. On July 29, or 17 days after Judge Carson's decision issued, Ahern was having a conversation with coworkers Simmons and David Hall. Casady passed Simmons and Hall, walked directly up to Ahern, and asked where he had been because he had not seen him lately. This was unusual, since Ahern did not normally see or talk to Casady. On July 30, Killips, Ahern's supervisor, approached him and asked what he was discussing with the other employees when Casady approached him the day before.[42]

D. The Charging Party's Discharge

By August 2, the Respondent succeeded in obtaining a subpoena from the circuit court. On that date, Kinko's permitted Casady to use their equipment to view their surveillance videotape for June 9. The tape revealed that Ahern sent the package.[43] Casady returned to the facility, met with Zimmerman and Ruhman, and informed them of his findings. After consulting with Zimmerman, Casady decided to discharge Ahern based on violations of "rules of conduct" 21 and 31. Casady's premise for invoking those provisions was Ahern's false designation of Pierson as the sender of the package and the false allegations against Gaffka.[44] Casady made this recommendation even though he knew that it was not improper for an employee to send an anonymous letter expressing an opinion about a supervisor.[45] Furthermore, Ahern had no prior disciplinary history.[46]

On August 3, Casady instructed Killips to bring Ahern to his office. When Ahern arrived, Casady showed him the package and asked him if he knew anything about it. Ahern denied any knowledge about the package and remained silent as Casady reviewed its contents. Ahern offered no response when Casady told him that he had been seen on the Kinko's surveillance videotape. Casady then informed Ahern that his deceptive acts warranted termination under rules 19, 21, and 31.[47]

On August 4, Casady sent a letter confirming Ahern's termination and several enclosures: copies of the Respondent's "rules of conduct violation" form; the FedEx label; the June 2 letter to Ogihara; and a list of the rules he violated. The letter also informed Ahern that he was "eligible for either a Peer Review or Discipline Committee hearing if you so elect within 7 days. Please let me know if you wish either option. You may also make a statement in this form and return it to me if you wish."[48] The rules of conduct violation form, dated August 3, stated the following "investigation" findings, which omitted any reference to the allegations in the package regarding the working conditions allegedly created by Gaffka:

> On 8/3/04 it was discovered that Andy sent a package from Kinko's to Novi to Mr. Ogihara. The return address indicated Bruce Pierson, Andy said Bruce had nothing to do with it. The package contained a letter and pictures (letter is attached).[49]

The form was signed by Killips and Poe and listed the violated rules as 19, 21 and 31. The rule 31 violation was noted to be the "most severe" and the proposed action was termination. An attached form contained definitions of the rules violations:

> 19. Deliberate falsification of work sheets, official Company administrative forms, personnel or employment

[39] I based this finding on the fact that Casady met with Gaffka during the week prior to June 24, which was shortly before the filing of the lawsuit on June 28. Tr. 585.

[40] In its brief, the General Counsel requests that an adverse inference be drawn against the Respondent for failing to comply with its subpoena. GC Br. at 53–55. That request is denied. The General Counsel was given an opportunity, prior to the close of the record, to apprise the Respondent as to the basis of such a motion. The General Counsel was unable to articulate such a basis, especially with respect to the alleged noncompliance with the subpoena. Tr. 630–631. There was extensive discussion and testimony at the hearing about nonproduced documents, including the extent to which any of the documents may fall within the work product and attorney-client privileges against disclosure. Tr. 271–332. However, the primary focus seemed to be whether Gaffka wrote comments on the photographs prior to Ahern's discharge. In that regard, Gaffka credibly testified that he made notes on the photographs at the request of his attorney *after* Ahern's discharge. Tr. 618–621.

[41] Casady's explanation that this did not involve a "complex issue" simply was not credible since this was a "pretty serious matter" to the Respondent. Tr. 305–306, 525.

[42] This finding is based on the credible testimony of Ahern and Simmons. Tr. 72–73, 144, 189. Casady and Killips, on the other hand, did not offer rebuttal testimony on this issue.

[43] Tr. 310, 433–439, 555–556.

[44] Casady's assertion that he wanted to "double check" with Ruhman that the photographs were deceptive was not credible. Tr. 440–441, 513–514. As previously discussed, Casady met with Ruhman around June 21, and was informed that several of the photographed conditions and equipment required corrective action.

[45] Casady conceded that it was not a dischargeable offense to send an anonymous letter complaining about a supervisor. Tr. 541–542.

[46] Respondent's counsel elicited this information on cross-examination. Tr. 94.

[47] Tr. 74–76, 145–146, 442–445.

[48] GC Exhs. 12(a)–12(e), 31(b).

[49] Ahern and Casady provided conflicting testimony as to whether Pierson's name came up during the meeting. I credit Casady's testimony in this regard, as Ahern simply could not recall if it came up. Tr. 80, 444.

> records, medical documentation, testimony at a Peer Review hearing, production records, etc.
>
> 21. Displaying immoral conduct, participating in harassment of any nature toward or about any Associate of the company.
>
> 31. Posting of materials, or the creating of graffiti with racial, sexist or religious symbols, or threatening commentary which do not reflect Ogihara's Core Values and may be intimidating to other Associates.

The form also stated that a first offense of rules 19 and 21 would result in a final warning and a 3-day suspension, while any violation of rule 31 would result in discharge.[50] The handbook does not, however, define "core values."[51] Nor does it address the case where an employee sends an anonymous letter to Ogihara or another manager. In fact, the only provision in the employee handbook dealing with honesty is found in "standards of conduct violations," which include "[f]alsifying OAC records or reports of any kind, or providing false information, including personnel records, physician examinations, inventory count, quality control reports and so on."[52] That provision does not apply to the facts of this case.

Several days after his discharge, Ahern left a message on Casady's telephone voicemail requesting a peer review or hearing before the disciplinary committee. Casady received the call, but never returned it or followed up on Ahern's request.[53] The peer review provision, which did not specify that the request needed to be made in writing, stated that in part:

> Nonexempt Associates who have successfully passed their introductory period are eligible to exercise their option to have the discipline reviewed provided they do so within 14 days of receiving disciplinary action and follow the Committee Procedure.[54]

E. The Respondent's Threats to Other Employees

Approximately 2 weeks after Ahern's discharge, Casady met with Simmons, Griswold, and other press maintenance shift employees. By this time, the initial and amended charges in this proceeding had been posted next to the employee timeclock. Casady told the employees that he heard rumors about the circumstances leading to Ahern's discharge and wanted to clarify the facts. He explained that the discharge was related to Ahern's transmission of the package and that unnamed parties responded by commencing a lawsuit for $25,000 in damages. Casady further noted that the unnamed plaintiffs "may go in [the] direction" of suing for $25 million if the Union was determined to be involved.[55]

III. LEGAL ANALYSIS

A. The Charging Party's Discharge

The consolidated amended complaint alleges that the Respondent discharged Ahern on August 3 in violation of Section 8(a)(1), (3), and (4) because he engaged in union activity and other concerted protected activity by sending the package. The Respondent denies the allegations and contends that Ahern did not engage in concerted protected activity because he falsely listed Pierson as the sender of the package, and the allegations were baseless and did not relate to actual conditions of employment.

1. The 8(a)(1) charge

Ahern was discharged because he sent the package to Ogihara. As such, the relevant focus under Section 8(a)(1) is simply whether Ahern, in sending the package, was engaging in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." Such Section 7 activity, however, must relate to the terms and conditions of employment in order to enjoy protected status. The employee's activity must also "be engaged in with or on the authority of other employees, and not solely by or on behalf of the employee himself." *Meyers Industries (Meyers I)*, 268 NLRB 493, 497 (1984), revd. sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985). If so, the only issue is whether the employee lost the protection of the Act. *Tradewaste Incineration*, 336 NLRB 902, 907 (2001); *Felix Industries*, 331 NLRB 144, 146 (2000).

Ahern, Simmons, and Griswold comprised a group of employees complaining about a supervisor whose work they perceived as mediocre, thus creating more work and a more dangerous working environment for them. Their initiative to get him demoted, however, stemmed from their irritation that he was being unduly tough on coworkers. As such, they enclosed pictures to support their legitimate contentions about electrical code violations, unlabeled electrical wiring, an ineffective pump, exposed equipment, and sloppy work areas—all partially or entirely attributable to Gaffka. Ahern's action in sending the package to Ogihara on behalf of himself, Griswold, and Simmons thus came to the "mutual aid or protection" of coworkers within the meaning of Section 7. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962); *RGC (USA) Mineral Sands, Inc.*, 332 NLRB 1633, 1641 (2001). Even aside from concerns

[50] GC Exh. 13(b)–13(c).

[51] Casady asserted that the rule 31 violation was based on Ahern's failure to adhere to the core value of integrity, which encompassed honesty. Tr. 447–449. There is no such statement in the handbook. Furthermore, when pressed on cross-examination, Casady explained that the letter was "threatening" because Ahern listed Pierson's name on the return label was "intimidating" to Pierson and "the accusations about Dave Gaffka and his work, which could've threatened his job." Tr. 516–517.

[52] GC Exh. 4, p. 45.

[53] Casady's explanation—that Ahern never followed up the request in writing—was not credible. He conceded that the employee handbook did not require such a request to be in writing and, in fact, provided that anyone with questions about the peer review rights should contact him. Tr. 526–527, 561–562, 566–567.

[54] GC Exh. 4, p. 46.

[55] There is no dispute that Casady commented on Ahern's concerted activity in sending the package, as well as an increase in damages sought if the Union was involved. Tr. 191, 359–360, 456. Casady did, however, attempt to attribute the $25 million comment to a question purportedly raised by Matt Manseur, a first-shift employee. I did not find this explanation credible. There was no reference in the initial or amended charges to the amount of a lawsuit against Ahern; nor was there any indication how Manseur came up with that information. Accordingly, I adopt the credible testimony of Simmons and Griswold that Casady volunteered the $25 million comment. Tr. 457–459.

about the safety and well-being of fellow employees, the Board has held that employees who raise concerns about a supervisor's competency engage in protected activity where it makes their work more difficult or otherwise directly impacts their working conditions. *Senior Citizens Coordinating Council of Riverbay*, 330 NLRB 1100, 1103–1104 (2000); *Atlantic-Pacific Construction Co. v. NLRB*, 52 F.3d 260, 263 (9th Cir. 1995); *Delta Health Center*, 310 NLRB 26, 35 (1993).

Ahern did, however, use a false name, address, and telephone number on the package that he sent Ogihara, and the issue remains whether such conduct was so egregious as to remove it from the protection of Section 7. *Milk Wagon Drivers Union v. Meadowmoor Diaries, Inc.*, 321 U.S. 287, 293 (1941); *Caterpillar Tractor Co.*, 276 NLRB 1323, 1326 (1985). The Board permits employees significant leeway to make false statements while engaging in protective activity absent a showing of "deliberate falsity or maliciousness." *Guardian Industries Corp.*, 319 NLRB 542, 549 (1995); S*print/United/Management Co.*, 339 NLRB 1012, 1018 (2003). Here, there was nothing false about the statements containing the essence of the protective activity, that is, the allegations in the letter or the photographs; only the vehicle by which the protected activity was communicated contained false information in order to protect concerned employees. Nor did Ahern have a personal motive in using Pierson's name.

First, Ahern, Simmons, and Griswold decided to send an anonymous letter to Ogihara because they were legitimately concerned about reprisals and the likelihood that the Respondent would not respond effectively if he knew that Ahern sent the letter. Ahern intended to send the letter anonymously. However, that approach was stymied when the Kinko's store clerk informed him that he needed to list a name, address, and telephone number on the return label. Ahern's response by listing Pierson, although less than virtuous and obviously aggravating to Pierson, had the effect of keeping the letter anonymous. Ahern insulated Pierson from responsibility for sending the letter by handwriting it and listing a clearly incorrect home address and telephone number. This approach effectively disconnected Pierson from the letter, since it would be unreasonable to expect a person sending critical information to his employer to complicate his situation by including a false address and telephone number.

Second, Ahern was not motivated by a desire to have Pierson fired, thus enabling Ahern to move from his second shift assignment into Pierson's more desirable first-shift schedule. Ahern already knew that another first-shift employee, Gary Babbitt, was retiring in August and that he was in line to replace him.

Lastly, Ahern's denial that he knew anything about the package did not cause him to lose the protection of the Act, as an employee is under no obligation to respond to questions that seek to uncover his protected activities. *Exxon Mobil Corp.*, 343 NLRB No. 44, slip op. at 19–20 (2004); *United Services Automobile Assn.*, 340 NLRB 784 (2003*)*; *St. Louis Car Co.*, 108 NLRB 1523 (1954*)*. In fact, an employer may not discharge an employee for lying in response to such questions. *Tradewaste Incineration*, 336 NLRB 902 (2001); *Frazier Industrial Co.*, 328 NLRB 717 (1999).

Under the circumstances, Ahern's false information on the return address label was not so "opprobrious, profane, defamatory, or malicious" as to lose the protection of the Act. *American Hospital Assn.*, 230 NLRB 54, 56 (1977). Indeed, the Board has countenanced similar conduct where an employee, in good faith, forged other employees' signatures on grievance forms. *OPW Fueling Components*, 343 NLRB No. 111, slip op. at 6 (2004); *Roadmaster Co.*, 288 NLRB 1195, 1196 (1998).

The Respondent also contends that Ahern did not engage in concerted protected activity because he failed to transmit his concerns through the Respondent's open door or blue press procedure. Ahern, Simmons, and Griswold felt, however, that both procedures were inappropriate mechanisms for the submission of their concerns. The open-door procedure provided for employees to meet with their immediate supervisor, while the blue press required that they place their concerns in a suggestion box to be reviewed by a group of employees. They had a good-faith belief that neither a meeting with their immediate supervisor nor the submission of a complaint in a suggestion box would accomplish their goal of having Gaffka demoted. As such, they decided to express themselves directly to Ogihara, the president of the Company. This channel was made available in the "employment philosophy" section of the employee handbook, which indicated that employees were free to approach anyone in management with their concerns at any time. See GC Exhibit 4 at 11. In any event, the protections of Section 7 do "not depend on the manner in which the employees choose to press the dispute, but rather on the matter that they are protesting." *Tamara Foods, Inc.*, 258 NLRB 1307, 1308 (1981), enfd. 692 F.2d 1171 (8th Cir. 1982), cert. denied 461 U.S. 928 (1983), citing *Plastilite Corp.*, 153 NLRB 180, 184 (1965*)*, enfd. in pertinent part 375 F.2d 343 (8th Cir. 1967). As such, concerted activity does not lose its protection where it is expressed in a manner inconsistent with those prescribed by management. *American Hospital Assn.*, 230 NLRB 54, 56 (1977). Under the circumstances, Ahern's discharge for sending the package violated Section 8(a)(1) of the Act.

2. The 8(a)(3) charge

The complaint also alleges that Ahern's discharge was the result of discrimination by the Respondent and tended to discourage membership in the Union. Under *Wright Line*, 251 NLRB 1083 (1980), the General Counsel has the initial burden of establishing that union activity was a motivating factor in the Respondent's action alleged to constitute discrimination in violation of Section 8(a)(3) of the Act. The elements required to support such a prima facie violation of Section 8(a)(3) are union activity, employer knowledge of the activity, adverse action against the employee, and a connection between the employer's union activity and the adverse action. Once the General Counsel has established a prima facie case, the burden shifts to the Respondent to show it would have terminated Ahern even in the absence of protected activity.

The Respondent did not refute the contention that it had prior knowledge of Ahern's union activities. Ahern wore union paraphernalia to work, handed out union propaganda during the organizing campaign, represented the union as an observer at

the representation election, and testified on behalf of the Union at the subsequent hearing relating to the Union's objections and related unfair labor practice charges. The Respondent denies, however, that Ahern's discharge for sending the letter to Ogihara is in any way connected to his union activity.

Improper employer motivation is frequently established by circumstantial evidence and may be inferred from several factors, including: the Respondent's known hostility toward unionization coupled with knowledge of an employee's union activities; pretextual and shifting reasons given for the employee's discharge; the timing between an employee's union activities and the discharge; and the failure to adequately investigate alleged misconduct. *Temp Masters, Inc.*, 344 NLRB No. 142, slip op. at 9–10 (2005); *Promedica Health Systems, Inc.*, 343 NLRB 131, slip op. at 17 (2004). All of these factors are present.

In addressing the Respondent's hostility toward unionization, I did not rely on Daniels' testimony that Poe referred to Ahern as "angry Andy" or stuck out his tongue at him. Such behavior could be attributable to a personality conflict as much as the union controversy. Nevertheless, there is overwhelming evidence of motivation. The Respondent's hostility toward unionization was memorialized in its employee handbook and articulated at mandatory employee group meetings during the Union's organizing campaign in the fall of 2003. On July 12, Judge Carson found that the Respondent interfered with the lawful distribution of union literature by employees in nonworking areas and illegally disciplined employee Mikulka for engaging in such activity. Seventeen days later, Casady approached Ahern as he conversed with coworkers and made an unusual comment inquiring about Ahern's recent whereabouts. The next day, Ahern's supervisor, Killips, asked what he had been discussing with the other employees when Casady approached him the day before. Finally, after his discharge, Ahern telephoned Casady and left a message invoking his right to a review by the Respondent's disciplinary committee. Casady admitted receiving the request, but ignored it. Casady's excuse, that the request was not made in writing, was baseless, as there is no such requirement.

The Respondent's motivation is also revealed by the fact that the allegations in the package were not meaningfully investigated and that, from the very outset, Casady's sole focus was in finding out who sent the package. Casady testified that he relied on Ruhman to conduct an investigation, but Ruhman relied on Gaffka to investigate himself. Gaffka, however, did not investigate the allegations; in fact, he did not provide anyone with an analysis of the conditions depicted in the photographs until after Ahern was discharged. He was shown the photographs shortly after Casady met with Pierson and, at that time, Gaffka confirmed that he was responsible for some, but not all, of the conditions depicted in the photographs. Based on the credible evidence, it is clear that he conveyed Gaffka's sentiments that the photographs were accurate representations of the objects depicted and either warranted corrective work or were already under review.

Coming in the midst of a hotly contested union campaign, Casady's obsession with the sender of the package leads to the inescapable conclusion that he suspected that the authors of the package may have been union supporters. His constantly shifting testimony revealed that he did not need to speak with the sender of the package in order to investigate the allegations. He determined prior to meeting with Pierson that the letter was not in his handwriting and the address and telephone number listed on the return label were not his. Nevertheless, Casady still met with Pierson for 20–30 minutes attempting to find out if Pierson had any idea as to who sent the package. That approach did not reveal any leads, so Casady undertook the extreme measure of initiating a lawsuit and obtaining a subpoena for the production of surveillance videotape revealing the sender's identity. Contradicting Casady once again, Gaffka testified that Casady obtained his consent to participate in such a lawsuit by telling him that the Respondent was "doing an investigation into the whole package."

After obtaining the videotape and determining that Ahern sent the package, Casady terminated Ahern based on alleged violations of handbook rules 19, 21, and 31, indicating that the rule 31 violation was the most severe. The discharge was issued less than a month after the Board found that the Respondent had committed unfair labor practices during the election campaign and authorized another election. None of these rules, however, applied to Ahern's conduct. Ahern did not falsify company records or forms or provide false testimony at a peer review hearing (rule 19), did not display immoral conduct or harass another employee (rule 21), and did not post materials or graffiti with racial, sexist, or religious symbols, "or threatening commentary which do not reflect Ogihara Core Values and may be intimidating to other Associates." (Rule 31). To the contrary, the package was sent privately and contained fair and accurate depictions of conditions and equipment in need of corrective action, and requested confidentiality. It was the Respondent's decision to essentially ignore the allegations in the letter and the request that it be investigated in a confidential manner.

In addition, Ahern did not have a prior disciplinary history with the Respondent. The record in the prior hearing before Judge Carson reveals that the discriminatee in that proceeding received a mere written reprimand for an alleged rule 31 violation. Based on the foregoing, I find that the Respondent's shifting and pretextual reasons for tracking down the person who sent the package, the relative severity of the sanction applied, the timing of the discharge shortly after the Union succeeded in overturning the election results, and the spurious grounds relied upon by the Respondent, all demonstrate that Ahern's discharge was motivated by his active support for the Union.[56]

Since the General Counsel established a prima facie case, the burden of persuasion shifted to the Respondent to prove, by a preponderance of the evidence, that it would have discharged Ahern even in the absence of his union activity. *Senior Citizens Coordinating Council of Riverbay Community Inc.*, 330

[56] I do not find, however, that the Respondent's continued investigation of Ahern after his discharge "is evidence that he was discharged for his union and protected concerted activity." GC Br. at 51. By then, the parties were in a litigation posture and the Respondent's actions in further investigating Ahern and submitting such information to the Michigan unemployment compensation office could simply have been defensive in nature.

NLRB 1100, 1105–1106 (2000); *Monroe Mfg.*, 323 NLRB 24, 27 (1997). In order to meet this burden, the Respondent was required to do more than show that it had a legitimate reason for its actions. *Black's Railroad Transit Service*, 342 NLRB No. 48, slip op. at 9 (2004); *Hicks Oil & Hicksgas, Inc.*, 293 NLRB 84, 85 (1989), enfd. 942 F.2d 1140 (7th Cir. 1991). The Respondent did not make such a showing. As previously explained, the Respondent did not have legitimate grounds for disciplining Ahern. Casady conceded that the mere sending of the package did not violate any of the Respondent's rules and that the allegations could have been investigated without uncovering the sender of the package. Furthermore, none of the rules cited in the discharge notice applied to Ahern's conduct, which consisted of sending a package containing meritorious allegations regarding Gaffka's work. In addition, the only proof in the record of a rule 31 violation by another employee reveals that the Respondent responded in that instance with a written reprimand. Under the circumstances, I find that the Respondent violated Section 8(a)(3) and (1) of the Act.

3. The 8(a)(4) charge

The complaint further alleges that the Respondent unlawfully discharged Ahern because he testified at the representation hearing in Case 7–RC–22589. The Respondent does not deny "anti-union history and general bias," but denies any connection between Ahern's discharge and his testimony in the prior proceeding. The Respondent relies on several facts: Ahern was not disciplined previously; other union supporters were not disciplined at all; and his discharge came nearly 3 months after he testified at the prior proceeding.[57]

Section 8(a)(4) makes it unlawful to discharge or otherwise discriminate against an employee because he filed charges or gave testimony at a Board proceeding. A *Wright Line* analysis is also applicable in Section 8(a)(4) cases. *Black's Railroad Transit Service*, supra, slip op. at 6. Here, there is no issue that the Respondent was hostile to unionization and was aware of Ahern's activities in that regard. As previously discussed, Ahern testified at the prior unfair labor practice and representation hearing before Judge Carson in May. On July 12, the Board upheld Judge Carson's decision finding the Respondent in violation of Section 8(a)(3) and (1), upheld the Union's objections to the representation election results, and authorized the Regional Director to conduct a new election at the appropriate time.

In addition to the overwhelming evidence that the Respondent was hostile to the Union, the timing of Ahern's discharge was suspicious. *La Gloria Oil*, 337 NLRB 1120, 1124 (2002); *Pepsi Cola Bottling Co.*, 301 NLRB 1008, 1053 (1991). Ahern was discharged less than 1 month after the Board issued its Order authorizing another election. This event, rather than Ahern's May 25 hearing, was the appropriate timeframe, since the Respondent excepted to that decision after it issued in July. Upon learning of Judge Carson's decision, the Respondent had reason to expect there would be another election. It also had to reasonably expect that Ahern would, once again, provide critical support to the Union. That reality, coupled with the pretextual and shifting reasons given for Casady's investigation of the package, provides compelling evidence of a connection between Ahern's previous Board testimony and his discharge. Furthermore, for the reasons discussed above in connection with the 8(a)(3) violation, the Respondent failed to sustain its burden of showing it would have discharged Ahern anyway. Under the circumstances, I find that the Respondent violated Section 8(a)(4) and (1) of the Act.

B. The Respondent's Interrogation of Employees

The General Counsel alleges that the Respondent violated Section 8(a)(1) when Casady coercively interrogated Pierson about the package in June, and again on August 3 when Ahern was called to Casady's office. The Respondent denies the allegations. The Respondent asserts that Casady's statements to Pierson focused on the allegations against Gaffka, while his meeting with Ahern consisted of a simple inquiry as to whether Ahern sent the package, followed by Ahern's termination.

In evaluating the propriety of Casady's conduct, the test is whether his interrogation reasonably tended to interfere with, threaten, or coerce Pierson and Ahern in the exercise of their Section 7 rights. *See Alliance Steel Products*, 340 NLRB 495 (2003). Whether an interrogation is unlawful is determined by the totality of the circumstances. *Rossmore House*, 269 NLRB 1176, 1177 (1984).

1. Casady's statements to Pierson on June 11

Casady met with Pierson alone in his office less than 1 month after Judge Carson conducted a hearing into the Respondent's alleged unfair practices during the organizing campaign. During the meeting, which lasted 20–30 minutes, Casady placed the letter and photographs on his desk and asked Pierson whether he had ever seen them before. When Pierson denied prior knowledge of the package, Casady asked whether he might have any enemies who might have sent it using his name. Pierson had no idea. In addition, based on Pierson's credible testimony, Casady did not mention anything about investigating the allegations against Gaffka.

In analyzing this alleged violation, the General Counsel contends that Casady already knew that Pierson did not send the package, could have investigated the allegations without speaking with Pierson and, in fact, did not conduct a meaningful investigation of the allegations against Gaffka. These considerations are irrelevant, however, in applying the appropriate standard. The standard is not Casady's motive or what he knew. In determining whether Casady's statements were coercive, the standard is an objective one. *Krystal Enterprises*, 345 NLRB No. 115, slip op. at 33 (2005)*; Meijer Inc.*, 344 NLRB No. 115, slip op. at 2 (2004); *MDI Commercial Services*, 325 NLRB 53, 63–64 (1994).

Casady met with Pierson in the midst of Board litigation relating to the Respondent's strong opposition toward unionization. Casady confronted Pierson about the package and its contents. During the course of the 20–30 minute meeting that ensued, Pierson obviously had occasion to see what the photographs conveyed. They conveyed the alleged concerns of other employees about the work performance of a supervisor; they also included a request for confidentiality. Casady's state-

[57] R. Br. at 24–25.

ments, absent an assurance that the Respondent was concerned about the allegations and was looking into them, further conveyed to Pierson that the Respondent was only interested in finding out who sent the package. Given the fact that the letter and photographs discussed concerted activity, the obvious message to Pierson was that the Respondent was hostile to employees' criticism of supervisors. Applying an objective standard, I find that Casady's interrogation of Pierson was coercive in nature and violated Section 8(a)(1).

2. Casady's statements to Ahern on August 3

Casady's August 3 meeting with Ahern was briefer, but lasted long enough for Casady to show Ahern the package. Rather than explain to Ahern that the "confidential" letter and photographs had been investigated, the Respondent simply dealt with the issue of whether he sent the package. Ahern denied any knowledge about it. Casady responded by telling Ahern that surveillance videotape revealed that Ahern sent the package. Ahern did not respond. Shortly thereafter, without any discussion regarding the allegations in the letter and photographs, Casady told Ahern that he was terminated for his "deception" in sending the letter. As in the meeting with Pierson, Casady's statements to Ahern conveyed the message that the Respondent was hostile to the criticism of a supervisor. Under the totality of the circumstances, I find that the Respondent violated Section 8(a)(1).

C. The Respondent's Threat

The complaint also alleges that Casady, on August 4, threatened employees that the Respondent would seek a larger damage award in the lawsuit against Ahern if it determined that the Union was involved in sending the package. The Respondent denies the allegation and contends that it was an employee, not Casady, who asked whether the unnamed plaintiffs in the state lawsuit would increase their request for damages to $25 million in such an instance.

An employer violates Section 8(a)(1) when it threatens to institute legal action because an employee engaged in protected concerted activity. See *Anheuser-Busch, Inc.*, 337 NLRB 3, 23 (2001); *Braun Electric Co.*, 324 NLRB 1 (1997); *Holy Cross Hospital*, 319 NLRB 1361, 1366 (1995); *Carborundum Co.*, 286 NLRB 1321, 1322 (1987). Casady made his remarks regarding the potential for an increased damage award in the context of a pending lawsuit against an employee—Ahern. At the time Casady made such statements, the unfair labor practice charges had been posted and employees knew of Ahern's claim that he had been discharged for engaging in protected activity. Casady did not qualify his statement regarding that lawsuit to exempt Ahern from such additional monetary exposure. The Union was not a defendant, and there was no indication that it would become a defendant. Legal considerations and theories of liability for joint tortfeasors aside, a reasonable understanding by employees hearing Casady's remarks would be that Ahern could be liable for up to $25 million for engaging in concerted protected activity. It was also evident to employees that the Respondent was involved in the retaliatory lawsuit, as Casady initiated the discussion and conveyed personal knowledge concerning the future intentions of the unnamed plaintiffs.

My recent decision in *Richard Lawson Excavating, Inc.*, JD-8-05, issued February 14, 2005, cited by the Respondent, is distinguishable. The 8(a)(1) charge in that proceeding involved a threat by the employer to file criminal charges against the union and union employees because they allegedly videotaped the employer's supervisor in violation of a Federal wiretapping statute. The threat was retaliation for the union's filing of unfair labor charges. There was no 8(a)(1) violation, however, because the threat was clearly aimed at the union for conduct unrelated to any protected concerted activity on the part of employees. As such, it was "pure speculation" that union officials would have to respond to such a lawsuit by choosing a course of action detrimental to employees' Section 7 rights.

Under the circumstances, I find that Casady's statement was objectively calculated to restrain employees in the exercise of their Section 7 rights and, therefore, violated Section 8(a)(1).

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By discharging Leo Andre Ahern because he engaged in concerted protected activity by sending a letter and photographs critical of a supervisor's work performance, the Respondent violated Section 8(a)(1) of the Act.
4. By discharging Ahern due to his support for the Union, the Respondent violated Section 8(a)(3).
5. By discharging Ahern because he testified at a representation hearing before the Board the Respondent violated Section 8(a)(4).
6. By interrogating Bruce Pierson as to who sent a letter and photographs critical of a supervisor's work performance, without discussing the merits of the allegations, the Respondent restrained the exercise of employees' Section 7 rights in violation of Section 8(a)(1).
7. By interrogating Ahern as to whether he sent a letter and photographs critical of a supervisor's work performance, without discussing the merits of the allegations, and then discharging him, the Respondent restrained the exercise of employees' Section 7 rights in violation of Section 8(a)(1).
8. By telling employees that certain unnamed persons would seek additional monetary damages against Ahern for sending the letter and photographs critical of a supervisor's work performance, if it were determined that the Union was involved in sending them, the Respondent restrained the exercise of employees' Section 7 rights in violation of Section 8(a)(1).
9. By engaging in the conduct described above, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged an employee, it must offer him reinstatement and make him whole for

any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[58]

ORDER

The Respondent, Ogihara America Corporation, Howell, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for engaging in protective concerted activity or supporting the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO, or any other union.

(b) Discharging or otherwise discriminating against any employee for testifying at a Board proceeding or otherwise cooperating with a Board investigation.

(c) Interrogating employees about their protected concerted activity.

(d) Threatening employees with legal action if they engage in protected concerted activity.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Leo Andre Ahern full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Leo Andre Ahern whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge, and within 3 days, thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Howell, Michigan, copies of the attached notice marked "Appendix."[59] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 11, 2004.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 3, 2005

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO, or any other union.

WE WILL NOT discharge or otherwise discriminate against any of you for testifying at a Board proceeding or otherwise cooperating with a Board investigation.

WE WILL NOT interrogate you for engaging in protected concerted activity.

WE WILL NOT threaten to bring legal action against you for engaging in protected concerted activity.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

[58] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[59] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL, within 14 days from the date of this Order, offer Leo Andre Ahern full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Leo Andre Ahern whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Leo Andre Ahern, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

OGIHARA AMERICA CORPORATION